CHAPTER 6

REVIEWABILITY

6.1 General.

a. Early Cases: Presumption of Nonreviewability. Until the 20th century, the federal courts employed a strong presumption that decisions of the Executive Branch were not reviewable. For example, in Decatur v. Paulding,[1] Mrs. Susan Decatur, widow of Commodore Stephen Decatur, challenged a determination made by the Secretary of the Navy that she was not entitled to receive a statutory pension. Because the Secretary of the Navy was charged with implementing the pension statute and was required to exercise his judgment and discretion in doing so, the Court refused to review his determination.

> The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. . . .
>
> . . . .
>
> The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them.[2]

---

[1] 39 U.S. (14 Pet.) 497 (1840).

[2] Id. at 515-16. See Keim v. United States, 177 U.S. 290 (1900); Hadden v. Merritt, 115 U.S. 25 (1885); Dorsheimer v. United States, 74 U.S. (7 Wall.) 166 (1869); United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842). 5 K. Davis, Administrative Law Treatise 254 (2d ed. 1984); Peck, The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities, 70 Mil. L. Rev. 1, 5-7 (1975); Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement, 55 U. Va. L. Rev. 483, 490 (1969).

b. Abrogation of the Presumption of Nonreviewability. In 1902, the Supreme Court reversed the presumption of nonreviewability for most executive activities in American School of Magnetic Healing v. McAnnulty.[3] McAnnulty involved a challenge to an administrative determination of the Postmaster General that the plaintiff was using the mails to engage in fraudulent business practices in violation of federal law. As a consequence, the Postmaster General ordered all mail addressed to the plaintiff returned to its senders. The plaintiff filed suit seeking to enjoin enforcement of the order. Reversing the lower court's dismissal of the complaint, the Supreme Court held that the plaintiff's claim was reviewable:

> That the conduct of the post office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head, or one of the subordinate officials, of that Department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.[4]

Thereafter, the Court found reviewability in many cases involving the federal government.[5]

Notwithstanding the broadening scope of reviewability in litigation involving the federal government, however, the courts continued to adhere to a presumption of nonreviewability in military

---

[3]187 U.S. 94 (1902).

[4]Id. at 108.

[5]Davis, supra note 2, at 255; Sherman, supra note 2, at 490.

cases for another half century.[6] The presumption of nonreviewability in military cases was finally overcome in Harmon v. Brucker.[7] In Harmon, the Court held that it had jurisdiction to determine whether the Secretary of the Army exceeded his statutory authority in issuing to the plaintiffs "less than honorable" discharges for preinduction activities. It found that the plaintiffs had alleged "judicially cognizable injuries."[8] Although the federal courts continue to express reluctance to review military activities,[9] many of these activities, like those of other federal agencies, are presumptively reviewable.[10]

c. Current Law: Presumption of Reviewability with Exceptions. While federal administrative actions are now presumptively reviewable,[11] the presumption is rebuttable.[12] Executive branch determinations in general, and military decisions in particular, are nonreviewable when Congress has proscribed review or when prudential considerations militate in favor of judicial abstention. In other words, nonreviewability is a doctrine based on a combination of congressionally-imposed restrictions and judicial self-restraint. An issue may not be reviewed when Congress has statutorily precluded

---

[6]See, e.g., Orloff v. Willoughby, 345 U.S. 83 (1953); Patterson v. Lamb, 329 U.S. 539 (1947); Denby v. Berry, 263 U.S. 29 (1923); United States ex rel. Creary v. Weeks, 259 U.S. 336 (1922); United States ex rel. French v. Weeks, 259 U.S. 326 (1922); Reaves v. Ainsworth, 219 U.S. 296 (1911). See also infra § 6.3. See generally Peck, supra note 2, at 9-16.

[7]355 U.S. 579 (1958).

[8]Id. at 582. See Peck, supra note 2, at 31-33; Sherman, supra note 2, at 491; Suter, Judicial Review of Military Administrative Decisions, 6 Houston L. Rev. 55, 56 (1968).

[9]See infra § 6.3.

[10]See McDaniel, The Availability and Scope of Judicial Review of Discretionary Military Administrative Decisions, 108 Mil. L. Rev. 89, 115-16 (1985).

[11]Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967).

[12]Block v. Community Nutrition Inst., 467 U.S. 340, 349 (1984).

judicial review or has granted a broad range of discretion to an executive agency in a particular field. These limits on reviewability are prescribed by the Administrative Procedure Act [APA].[13]

An issue may also be nonreviewable if its resolution would cause unwarranted interference with the military function and its resolution involves the application of expertise unique to the military. These limits of reviewability in military cases are imposed by federal courts. The principal doctrine applied by these courts is the so-called 'Mindes test" created by the United States Court of Appeals for the Fifth Circuit.[14] This chapter discusses the concepts of nonreviewability under the APA and the 'Mindes test."

d. Meaning of Nonreviewability. When we say an issue is nonreviewable, we do not mean that the court lacks the basic power to decide the controversy.[15] The court may have technical subject-matter jurisdiction and the dispute may be justiciable. Nonetheless, the courts may deem it inadvisable to decide a particular issue either because of congressional preclusion or prudential considerations. The question is said to be nonreviewable. Some confusion may also arise because the doctrine of nonreviewability and the political question prong of justiciability are similar and often used interchangeably.[16] Some differences exist, however, between the two concepts. Nonjusticiable political questions are usually "very broad or vague" and do "not arise from a specific injury or from any specific unlawful conduct. Thus, the very depth of the complaint makes it difficult for a court to provide relief without intrusion into discretionary functions within the realm of the President or Congress."[17] The

---

[13]5 U.S.C. § 701(a).

[14]Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

[15]Comment, Federal Judicial Review of Military Administrative Decisions, 51 Geo. Wash. L. Rev. 612, 613 (1983) [hereinafter Comment, Federal Judicial Review].

[16]Peck, supra note 2, at 61; see, e.g., Doe v. Alexander, 510 F. Supp. 900 (D. Minn. 1981).

[17]Peck, supra note 2, at 59.

doctrine of nonreviewability, by contrast, "may preclude review even of very specific injuries."[18] Army litigators will often argue the concepts of nonjusticiability and nonreviewability together, urging the court first to find a question nonjusticiable or, if justiciable, nonreviewable.

6.2 Reviewability Under the Administrative Procedure Act (APA).

a. Applicability to the Military The APA is applicable to the armed forces except that it does not encompass courts-martial and military commissions or military authority exercised in the field in time of war or in occupied territory.[19] The legislative history of the APA clearly supports this view when it states:

> The committee feels that it has avoided the mistake of attempting to oversimplify the measure. It has therefore not hesitated to state functional classifications and exceptions where those could be rested upon firm grounds. In so doing, it has been the undeviating policy to deal with types of functions as such and in no case with administrative agencies by name. Thus certain war and defense functions are exempted, but not the War or Navy Departments in the performance of their own functions.[20]

b. Reviewability Under the APA.

---

[18] Id. at 60.

[19] 5 U.S.C. § 701(a). See Dronenberg v. Zech, 741 F.2d 1388, 1390 (D.C. Cir. 1984); Beller v. Middendorf, 632 F.2d 788, 796-97 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981); Jaffee v. United States, 592 F.2d 712, 718-17 (3d Cir.), cert. denied, 441 U.S. 961 (1979); Ornato v. Hoffman, 546 F.2d 10, 14 (2d Cir. 1976); McDaniel, supra note 10, at 94-96. But see Suter, supra note 8, at 57-60 (APA should not apply to military).

[20] S. Rep. No. 752, 79th Cong., 1st Sess. 5 (1945), quoted in McDaniel, supra note 10, at 95.

(1) General. The APA's provisions for judicial review are found in 5 U.S.C. §§ 701-706. The Act codified the presumption of reviewability of federal administrative activities.[21] Under the APA, any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof."[22] The federal courts give this provision a "hospitable interpretation" in favor of review.[23] Indeed, agency actions are reviewable under the APA unless another statute precludes judicial review or the agency action is committed to agency discretion by law.[24] These two exceptions to APA review--"statutory preclusion" and "committed to agency discretion by law"--are considered next.

(2) "Statutory Preclusion." An agency action is not reviewable under the APA to the extent another statute "precludes judicial review."[25] While few statutes expressly preclude judicial review, on occasion the federal courts will discern an "implied statutory preclusion of review."[26] Absent an explicit proscription against review, "[w]hether and to what extent a particular statute precludes judicial review is determined . . . from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved."[27] Where Congress has not expressly

---

[21]Davis, supra note 2, §§ 28:4, 28:5.

[22]5 U.S.C. § 702.

[23]Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967), quoting Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955). See also Clarke v. Securities Indus. Ass'n, 107 S. Ct. 750, 755 (1987); Morris v. Gressette, 432 U.S. 491, 501 (1977); Dunlop v. Bachowski, 421 U.S. 560, 567 (1975); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971); Rusk v. Cort, 369 U.S. 367, 379-80 (1962).

[24]5 U.S.C. § 701(a).

[25]5 U.S.C. § 701(a)(1).

[26]Investment Annuity, Inc. v. Blumenthal, 609 F.2d 1, 8 (D.C. Cir. 1979), cert. denied, 446 U.S. 981 (1980).

[27]Block v. Community Nutrition Inst., 467 U.S. 340, 345 (1984). See Clarke, 107 S. Ct. at 758; Morris, 432 U.S. at 501; Ludecke v. Watkins, 335 U.S. 160, 16365 (1948); Switchmen's Union of

footnote continued next page

barred review, the agency bears the burden of overcoming the presumption of reviewability by demonstrating that a particular statute or statutory scheme prohibits judicial intervention. "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."[28] The presumption favoring review may be overcome, however, by "a reliable indicator of congressional intent."[29] Examples of statutes held to preclude judicial review in areas of importance to the military are the Military Claims Act,[30] and the Civil Service Reform Act's performance appraisal system.[31]

(3) "Committed to Agency Discretion by Law"

(a) General. In the absence of specific statutory preclusion of judicial review, an agency action is nonreviewable under the APA only if that action has been "committed to agency discretion by law."[32] That an agency may exercise some discretion over a particular activity is not enough to bar review since § 706(2)(A) of the APA empowers federal courts to review agency

---

(..continued)
North America v. National Mediation Bd., 320 U.S. 297, 301 (1943); Note, Statutory Preclusion of Judicial Review under the Administrative Procedure Act, 1976 Duke L.J. 431, 447-49.

[28]Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967), quoting Rusk v. Cort, 369 U.S. 367, 380 (1962). See Dunlop v. Bachowski, 421 U.S. 560, 567 (1975).

[29]Block, 467 U.S. at 349. See Dellums v. Smith, 797 F.2d 817, 822-23 (9th Cir. 1986); Ruff v. Hodel, 770 F.2d 839, 840 (9th Cir. 1985); Rhodes v. United States, 760 F.2d 1180, 1183 (11th Cir. 1985).

[30]10 U.S.C. §§ 2733, 2735. See Schneider v. United States, 27 F.3d 1327 (8th Cir. 1994), cert. denied, 115 S. Ct. 723 (1995); Poindexter v. United States, 777 F.2d 231 (5th Cir. 1985); LaBash v. United States Dep't of the Army, 668 F.2d 1153 (10th Cir.), cert. denied, 456 U.S. 1008 (1982).

[31]5 U.S.C. §§ 4301-4305, 5401-5405. See Veit v. Heckler, 746 F.2d 508 (9th Cir. 1984).

[32]5 U.S.C. § 701(a)(2).

actions for an "abuse of discretion."[33] Instead, the agency must have broad unguided discretionary powers over the challenged activity.[34] Thus, the Supreme Court has held that judicial review of administrative actions is barred only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[35] This exception to review is a "very narrow" one.[36]

(b) Scope of the "Committed to Agency Discretion" Exception. The Supreme Court explored the boundaries of the "committed to agency discretion" exception to review in Heckler v. Chaney.[37] In Chaney, a number of prison inmates, convicted of capital offenses and sentenced to death by lethal injection of drugs, petitioned the Food and Drug Administration (FDA) to prevent the use of the drugs because they had not been approved by the FDA as "safe and effective" for human executions. The FDA refused the petition, and the plaintiffs sued claiming the FDA's refusal was an abuse of discretion under the APA. The Supreme Court held, however, that the FDA's refusal to

---

[33]See McDaniel, supra note 10, at 97-106.

[34]Local 2855, AFGE v. United States, 602 F.2d 574 (3d Cir. 1979). Cf. Robbins v. Reagan, 780 F.2d 37, 45 (D.C. Cir. 1985) ("The mere fact that a statute grants broad discretion to an agency does not render the agency's decisions completely nonreviewable under the 'committed to agency discretion by law' exception unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised."). Hondros v. United States Civil Serv. Comm'n, 720 F.2d 278, 292 (3d Cir. 1983). See generally Woodsmall v. Lyng, 816 F.2d 1241, 1243-46 (8th Cir. 1987).

[35]Webster v. Doe, 486 U.S. 592 (1988); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945); Kreis v. Sec'y of Air Force, 866 F.2d 1508 (D.C. Cir. 1989); Arnow v. United States Nuclear Regulatory Comm'n, 868 F.2d 223 (7th Cir.), cert. denied sub nom., Citizens of Illinois v. United States Nuclear Regulatory Comm'n, 110 S. Ct. 61 (1989).

[36]Id.

[37]470 U.S. 821 (1985).

commence enforcement proceedings to prevent the use of lethal drugs in executions was nonreviewable under the APA because the matter had been committed to the FDA's discretion by law.

> [E]ven where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have "committed" the decisionmaking to the agency's judgment absolutely. This construction avoids conflict with the "abuse of discretion" standard of review in § 706--if no judicially manageable standards are available for judging how and when an agency should exercise its discretion then it is impossible to evaluate agency action for "abuse of discretion."[38]

The Supreme Court in Chaney established a presumption of nonreviewability for agency decisions not to exercise investigative or enforcement powers.[39] This presumption of nonreviewability may be overcome, however, where the substantive statute provides guidelines for the agency to follow in exercising its enforcement powers.[40]

---

[38]Id. at 830. See Southern Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 454 (1979); Schilling v. Rogers, 363 U.S. 666, 675-76 (1960); Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 317-18 (1958); Slyper v. Attorney General, 827 F.2d 821 (D.C. Cir. 1987); Clementson v. Brock, 806 F.2d 1402, 1404 (9th Cir. 1986); Florida v. United States Dep't of Interior, 768 F.2d 1248, 1255 (11th Cir. 1985), cert. denied, 475 U.S. 1011, 106 S. Ct. 1186 (1986); Local 1219, American Fed. of Gov't Employees v. Donovan, 683 F.2d 511, 515 (D.C. Cir. 1982); Rank v. Nimmo, 677 F.2d 692, 699-700 (9th Cir.), cert. denied, 459 U.S. 907 (1982); Alan Guttmacher Inst. v. McPherson, 597 F. Supp. 1530, 1534-35 modified at 805 F.2d 1088 (S.D.N.Y. 1984).

[39]Heckler, 470 U.S. at 832; Block v. SEC, 50 F.3d 1078 (D.C. Cir. 1995); Harmon Cave Condominium Ass'n v. Marsh, 815 F.2d 949 (3d Cir. 1987). Cf. Falkowski v. EEOC, 764 F.2d 907 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 3319 (1986) (Justice Department decision not to represent individually-sued federal official is presumptively nonreviewable under Chaney).

[40]See Dunlop v. Bachowski, 421 U.S. 560 (1975); The Supreme Court, 1984 Term, 99 Harv. L. Rev. 120, 267 (1985).

In Webster v. Doe[41] the Court held that where Congress gave broad discretionary employment termination power to the Director of the CIA, the Director's exercise of that power was not reviewable for allegedly being arbitrary and capricious in violation of the APA because such a review had been committed to the agencies' discretion. The Court explained, however, that where a former employee alleges his dismissal violated his constitutional rights, congressional intent to preclude judicial review of such a claim must be clear.

> A discharged employee thus cannot complain that his termination was not "necessary or advisable in the interests of the United States," since that assessment is the Director's alone. Subsections (a)(1) and (a)(2) of § 701, however, remove from judicial review only those determinations specifically identified by Congress or "committed to agency discretion by law." Nothing in § 102(c) persuades us that Congress meant to preclude consideration of colorable constitutional claims arising out of the actions of the Director pursuant to that section; we believe that a constitutional claim based on an individual discharge may be reviewed by the District Court.

More recently, in Lincoln v. Vigil,[42] the Court held that an agency's allocation of funds from a lump-sum appropriation is committed to agency discretion by law as long as the allocation meets permissible statutory objectives. The Court summarized its cases as follows:

> The Act provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof," 5 U.S.C. § 702, and we have read the Act as embodying a "basic

[41]486 U.S. 592 (1988).

[42]113 S. Ct. 2024 (1993). See 42 UCLA L. Rev. 1157, 1234; 95 Colum. L. Rev. 749, 755; 108 Harv. L. Rev. 27, 104.

presumption of judicial review." Abbott Laboratories v. Gardner, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967). This is "just" a presumption, however, Block v. Community Nutrition Institute, 467 U.S. 340, 349, 104 S.Ct. 2450, 2455, 81 L.Ed.2d 270 (1984), and under § 701(a)(2) agency action is not subject to judicial review "to the extent that" such action "is committed to agency discretion by law." As we explained in Heckler v. Chaney, 470 U.C. 821, 830, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985), § 701(a)(2) makes it clear that "review is not to be had" in those rare circumstances where the relevant statute "is drawn so that a court would have no meaningful standard against which to judge the agency's discretion." See also Webster v. Doe, 486 U.S. 592, 599-600, 108 S.Ct. 2047, 2052, 100 L.Ed.2d 632 (1988); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.C. 402, 410, 91 S.Ct. 814, 820-821, 28 L.Ed.2d 136 (1971). "In such a case, the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." Heckler, supra, at 830, 105 S.Ct. At 1655.

(c) Factors Used in Determining the "Committed to Agency Discretion" Exception. Federal courts often cite three criteria used in determining whether an agency's discretion is so broad in a particular area as to be immune from judicial review:

> (1) the broad discretion given an agency in a particular area of operation, (2) the extent to which the challenged action is the product of political, economic or managerial choices that are inherently not subject to judicial review, and (3) the extent to which the challenged agency action is based on some special knowledge or expertise.[43]

[43]American Fed. of Gov't Employees Local 2017 v. Brown, 680 F.2d 722, 726 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983). See Story v. Marsh, 732 F.2d 1375, 1376-77 (8th Cir. 1984); Hondros v. United States Civil Serv. Comm'n, 720 F.2d 278, 293 (3d Cir. 1983); Suntex Dairy v. Block, 666 F.2d 158, 164 (5th Cir.), cert. denied, 459 U.S. 826 (1982); Local 2855, AFGE v. United States, 602 F.2d 574, 578-79 (3d Cir. 1979); Curran v. Laird, 420 F.2d 122, 128-29 (D.C. Cir. 1969) (en banc). See generally Ketler, Federal Employee Challenges to Contracting Out: Is There a Viable Forum?, 111 Mil. L. Rev. 103, 148-56 (1986).

Application of these factors in a military context is illustrated by the following case involving the Army's Commercial Activities Program.

AMERICAN FED. OF GOV'T EMPLOYEES LOCAL 2017

v. BROWN

680 F.2d 722 (11th Cir. 1982),

cert. denied, 459 U.S. 1104 (1983)

Before MORGAN, HILL and KRAVITCH, Circuit Judges.

JAMES C. HILL, Circuit Judge:

The appellants, Local 2017 of the American Federation of Government Employees and three former civilian employees of the Department of the Army at Fort Gordon, Georgia, filed a complaint in the United States District Court for the Southern District of Georgia, seeking temporary and permanent injunctive relief enjoining the United States Army from contracting out certain work performed by civilian employees at Fort Gordon. The complaint alleged inter alia that the defendants' decisions to contract out the work to Pan American World Airways (hereinafter Pan Am) violated sections 806(a)(1) and 806(a)(2)(A) of the Department of Defense Authorization Act, 1980. Pub. L. No. 96-107, 93 Stat. 803 (1979), 10 U.S.C. § 2304 note (Supp. III 1979). The District Court dismissed the complaint on the basis that the court lacked jurisdiction, and that the appellants lacked standing to sue. For the reason stated below we affirm the decision of the District Court.

The general policy of the federal government is to rely on competitive private enterprise to supply the products and services it needs except when comparative cost analysis indicates that procurement from a private source is not as cost-effective as in-

house performance. This policy is explicitly set forth in Office of Management and Budget (OMB) Circular No. A-76, 44 Fed. Reg. 20,556 (1979), revised, 45 Fed. Reg. 69,322 (1980). OMB Circular No. A-76 also provides guidelines for the implementation of the policy.

In 1979 Congress enacted the Department of Defense Authorization Act, 1980. Pub. L. No. 96-107, 93 Stat. 803 (1979), 10 U.S.C. § 2304 note (Supp. III 1979). Section 806(a) of the Act addressed the matter of the Department of Defense converting from in-house performance of commercial and industrial functions to performance of these functions by private contractor. Section 806(a) had the effect of elevating certain aspects of Circular A-76 to the status of law. Specifically, this provision stated that no function being performed by Department of Defense personnel could be converted to performance by a private contractor: (1) to circumvent any civilian personnel ceiling; (2) without prior notification to Congress of the decision to study the function for possible conversion; and (3) without certification to Congress of the in-house cost calculation.

The present case arose from the decision by the Department of the Army to contract out certain functions performed by the Directorate of Industrial Operations and Housing at Fort Gordon, Georgia. These functions included housing, maintenance, supply and service, and transportation. Prior to making the contracting out decision the Army conducted an analysis of the functions to determine whether a cost savings could in fact be achieved by conversion to a private contractor. As a part of this analysis the Army first performed a study to determine the most efficient and cost-effective organization for in-house performance of these functions. The Army then solicited and received cost proposals from private contractors for the performance of the functions. The cost proposal offered by Pan Am was determined to be the lowest of all the contractors. The Army compared Pan Am's cost proposal with the cost calculation for in-house performance and determined that an estimated 58-month savings of

approximately $32 million could be achieved by contracting with Pan Am for the performance of the functions.

The results of the Army's study were reported to Congress, including a certification that the Army's in-house cost calculation for the functions was based on an estimate of the most efficient and cost-effective organization for in-house performance. The Army's tentative decision to contract out to Pan Am was also reported to Congress. Congress raised no objections to the in-house cost calculations or to the decision to contract out.

The Army, consequently, awarded the contract to Pan Am. On the same day that the contract was awarded reduction-in-force notices were sent to 618 civilian employees at Fort Gordon whose positions would be eliminated because of the contract. The appellants then brought this action to enjoin the Army from proceeding with the conversion to Pan Am.

The appellant's complaint alleged that the conversion violated Public Law 96-107, Section 806(a) because it was done to circumvent civilian personnel ceilings, and because the Army's in-house cost calculations failed to provide a proper estimate of the most efficient and cost-effective organization for in-house performance.

The District Court did not consider the complaint on the merits, but rather held a hearing on the threshold issues of jurisdiction and standing. The court concluded that it was without jurisdiction because the Army's conversion decision was not subject to judicial review. The court further concluded that the plaintiffs lacked standing because they were not within the zone of interests protected by Section 806. Upon the dismissal of the plaintiff's complaint this appeal was taken.

II

The two issues before us on appeal are first, whether district courts have judicial review over alleged violations of Section 806(a) and second, whether affected civilian

employees and their labor organization have standing under Section 806(a) to challenge a decision of the Department of the Army to convert from in-house performance of certain base functions to performance by private contractors.

The appellants argue that pursuant to the Administrative Procedure Act (APA) judicial review of the Army's decision is available. They contend that Public Law 96-107 evinces no statutory preclusion of judicial review, and furthermore, that the Army's contracting decision is not committed to agency discretion by law.

There is no question that the APA affords judicial review of agency action to any person adversely affected or aggrieved by an agency action except to the extent that, (1) statutes preclude judicial review, or (2) agency action is committed to agency discretion by law. Public Law 96-107 contains no explicit preclusion of judicial review such that the first exception is clearly inapplicable to the present case. Whether the second exception applies depends upon an analysis of the nature of the agency decision involved. As we stated in Bullard v. Webster, 623 F.2d 1042 (5th Cir. 1980):

> In the absence of a statute that explicitly precludes judicial review, an agency action is committed to the agency's discretion and is not reviewable when an evaluation of the legislative scheme as well as the practical and policy implications demonstrate that review should not be allowed.

623 F.2d at 1046. In Bullard we indicated three criteria useful in making a determination of whether an action is committed to agency discretion: (1) the broad discretion given an agency in a particular area of operation, (2) the extent to which the challenged action is the product of political, economic or managerial choices that are inherently not subject to judicial review, and (3) the extent to which the challenged agency action is based on some special knowledge or expertise. Id. The application of these criteria to the case at hand convinces us that the decision to contract out was

indeed committed to the discretion of the Army and is thus not subject to judicial review.

We agree with the finding of the District Court that Section 806 vests the Army with broad discretion to make contracting out decisions and provides no legal standard for the court to apply. As the District Court stated:

> Section 806 is a statement of policy and legislative intent. It is a mandate from the legislative branch to the executive branch, but it is not replete with formulae or discernable (sic) guidelines against which the agency decision may be measured.

AFGE, Local 2017 v. Brown, No. CV 180-136 at 12 (S.D. Ga. August 29, 1980).

There is no dispute that in enacting Section 806 Congress sought to elevate some aspects of existing practice and procedure under OMB Circular A-76 to the status of law. Section 806 in no way affected the nature of the conversion decision and imposed no new standards to guide the military's discretion. Except for the requirements of congressional notification and reporting, there were no restrictions on conversions in Section 806 that are not in OMB Circular A-76. Indeed, the OMB Circular is far more detailed and offers far more by way of guidelines for decisions than does Section 806. Thus, a number of cases concerning Army conversion decisions made pursuant to OMB Circular A-76 are extremely persuasive. All of the courts which have considered the issue have held that conversion decisions made by the Department of Defense officials under Circular A-76 are committed to agency discretion and are not subject to judicial review. Local 2855, AFGE v. United States, 602 F.2d 574 (3d Cir. 1979); American Federation of Government Employees v. Stetson, C.A. No. 77-2146 (D.D.C. July 25, 1979); American Federation of Government Employees v. Hoffmann, 427 F. Supp. 1048, 1082-84 (N.D. Ala. 1976);

and AFGE, Local 1688 v. Dunn, No. A-75-15' (D. Alaska Sept. 30, 1975), aff'd on other grounds, 561 F.2d 1310 (9th Cir. 1977).

In Local 2855, AFGE, the Third Circuit observed that pursuant to Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410, 91 S. Ct. 814, 820 (1971), the committed to agency discretion exception to judicial review is intended to be "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' [citation omitted]." 602 F.2d at 578-79. In applying this rule to OMB Circular A-76 the court concluded that the circular failed "to provide meaningful criteria against which a court may analyze the Army's decision." Id. In a similar vein the District Court in the case at hand concluded correctly that because Section 806 lacked discernible guidelines "a District Judge would have no law to apply in determining whether or not a decision made by the agency was correct." AFGE, Local 2017 at 11-12.

The Army's contracting out decision is also an inappropriate subject for judicial review because the decision involves military and managerial choices inherently unsuitable for the judiciary to consider. As the Supreme Court noted in Orloff v. Willoughby, 345 U.S. 83, 78 S. Ct. 534, 97 L.Ed. 842 (1954) "[j]udges are not in the business of running the Army. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters." 345 U.S. at 93-4, 73 S. Ct. at 540.

In addition, the contracting out decision is based on the special expertise of the Army officials involved. Calculations of the most efficient and cost-effective way to perform a function at a military installation "are matters on which experts may disagree; they involve nice issues of judgment and choice." Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 78 S. Ct. 752, 2 L.Ed.2d 788 (1958). These issues are best resolved by the Army analysts rather than by the courts since, in the words of Justice Frankfurter, they "do not present questions of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment."

Driscoll v. Edison Light & Power Co., 307 U.S. 104, 122, 59 S. Ct. 715, 724 (1939) (Frankfurter, J. concurring).

The appellants argue further that the District Court erred in holding that they lacked standing to challenge the Army's contracting out decision. In view of our determination that the District Court was correct in finding that it lacked jurisdiction it is unnecessary to address the question of standing.

III

The judgment of the District Court is AFFIRMED.

(d) Effect of Agency Regulations and Policies. Even where a statute is drawn in such broad terms as to give the courts no meaningful standard against which to judge an agency action, "the agency itself can provide a basis of judicial review through the promulgation of regulations or announcement of policies."[44] "Once an agency has declared that a given course is the most effective way of implementing the statutory scheme, the courts are entitled to closely examine agency action that departs from this stated policy."[45]

(e) Military Administrative Actions and the "Committed to Agency Discretion" Exception. Perhaps because of the autonomy given to the service secretaries to govern their

[44]Robbins v. Reagan, 780 F.2d 37, 45 (D.C. Cir. 1985).

[45]Id. (footnote omitted). See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 41-42 (1983); Sargisson v. United States, 913 F.2d 918 (Fed. Cir. 1990); Chong v. Director, USIA 821 F.2d 171 (3d Cir. 1987). Cf. Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1953); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954) (agencies must abide by their own regulations).

departments,[46] and the broad nature of command discretion,[47] courts do not review many military administrative actions under the APA. Instead, the threshold for review of military determinations is generally greater than for other federal agencies. Most courts have adopted stricter standards of reviewability in cases involving the armed forces. These standards are embodied in the so-called "Mindes test."

6.3 Reviewability Under the "Mindes Test

a. Background.

(1) Traditionally the federal courts have been reluctant to review military activities.[48] As noted earlier,[49] the presumption of nonreviewability in military cases survived long after it was reversed in most other federal administrative litigation. Moreover, even though the presumption has been overcome, courts still grant a great deal of deference to military decisions.[50] This deference is grounded, in part, in the fear that review would "interfere with the military's ability to maintain order and discipline among service members."[51] The federal "'courts are ill-equipped to determine the impact

[46]See, e.g., 10 U.S.C. § 3012(g).

[47]Ornato v. Hoffman, 546 F.2d 10, 14 (2d Cir. 1976).

[48]See Haggerty, Judicial Review of Military Administrative Decisions, 3 Hastings Const. L.Q. 171 (1976); Peck, supra note 2, at 4; Note, Judicial Review and Military Discipline--Cortright v. Resor: The Case of the Boys in the Band, 72 Colum. L. Rev. 1048, 1054 (1972).

[49]See supra § 6.1.

[50]E.g., Goldman v. Weinberger, 475 U.S. 503 (1986); Rostker v. Goldberg, 453 U.S. 57, 64-67 (1981); Gilligan v. Morgan, 413 U.S. 1, 9-12 (1973).

[51]Comment, Federal Judicial Review, supra note 15, at 613.

upon discipline that any particular intrusion upon military authority might have."[52] This deference is also based on the constitutional separation of powers.[53] The Constitution entrusts regulation and control of the military to the legislative and executive branches of the government.[54] Judicial review of military activities necessarily causes the federal courts to intrude into areas constitutionally committed to these branches.[55]

(2) The classic case cited in support of nonreviewability of military activities is Orloff v. Willoughby.[56] Although military decisions are no longer presumptively nonreviewable, Orloff is still an important case, and military attorneys and federal courts often cite its sweeping language in favor of judicial deference to the military.

ORLOFF v. WILLOUGHBY

345 U.S. 83 (1953)

Mr. Justice Jackson delivered the opinion of the Court.

Petitioner presents a novel case. Admitting that he was lawfully inducted into the Army, he asks the courts, by habeas corpus, to discharge him because he has not been assigned to the specialized duties nor given the commissioned rank to which he claims to be entitled by the circumstances of his induction. The petitioner had passed

[52]Chappell v. Wallace, 462 U.S. 296, 305 (1983), quoting Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181, 187 (1962).

[53]Comment, Federal Judicial Review, supra note 15, at 614; Peck, supra note 2, at 59; Sherman, supra note 2, at 490.

[54]U.S. Const. art. I, § 2, art. II, § 8.

[55]Peck, supra note 2, at 59. See, e.g., Gilligan v. Morgan, 413 U.S. 1, 8 (1973); Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953).

[56]Orloff, 345 U.S. at 83.

the ages liable to induction except under the Universal Military Training and Service Act, 50 USC App § 454(i)(1)(A), which authorizes conscription of certain "medical and allied specialist categories." The statute sets up a priority system for calling such specialists, the first liable being those who received professional training at government expense during World War II and who have served less than ninety days since completion of such training. As a doctor who had received training under this program, Orloff was subject to this provision and was called up pursuant to it.

His petition alleged that he was illegally restrained of his liberty because he was liable for service only as a doctor, but after induction, had been given neither rank nor duties appropriate to that profession and so was entitled to be discharged. He alleged that under Army regulations and practice one can serve as a doctor only as a commissioned officer and that he applied for but had not received such an appointment. He also alleged that he had requested assignment of physician's duties, with or without a commission, but that this also had been denied him.

The return to the order to show cause asserted that Orloff was lawfully inducted and therefore the court is without jurisdiction of the subject matter. An affidavit by Colonel Willoughby set forth that the petitioner, after sixteen weeks of army medical service training following his induction, was awarded "a potential military occupation specialty" as a medical laboratory technician. Appointment as an officer in the Army Medical Corps Reserve, he said, was still under consideration. It also asserted that under his induction he was liable for training and service under military jurisdiction and was subject to military orders and service the same as any other inducted person.

Answering the petition for habeas corpus, the respondent raised as affirmative defenses that petitioner was subject to military command and that both the subject matter and the person of the petitioner were under the exclusive jurisdiction of the President of the United States as Commander in Chief of the Armed Forces, and that petitioner had failed to exhaust his administrative remedies. Respondent further stated that his application for a commission still was being processed by military authorities

"because of particular statements made by petitioner in his application concerning prior membership or association with certain organizations designated by the Attorney General of the United States on October 30, 1950 pursuant to Executive Order 9835," that the court was without jurisdiction, and that habeas corpus does not lie for the purpose of the case.

By way of traverse, Orloff set forth in detail his qualifications as a physician and psychiatrist and alleged that the medical laboratory technician status was not a doctor's work and required no more than a four-month training of a layman in the medical field service school. This, he claims, is not within the medical specialist category for which he was conscripted. He asserted that he was willing to serve as a medical specialist, that is as a medical doctor, and had offered his services as a doctor in the grade or rank of private but had been advised that he could serve as a doctor only upon being commissioned.

Upon such pleadings the cause proceeded to hearing. Petitioner's counsel told the trial court that no question was involved as to the Army's granting or not granting a commission and that the petitioner was not asking anybody to give anybody else a commission, but he claimed to be entitled to discharge until the Army was prepared to use his services as a doctor. It was admitted that petitioner had made no request of respondent for a discharge. Evidence was taken indicating that the specialty to which Orloff had been assigned was not that usual for a physician. The trial judge concluded that the law does not require a person drafted under the "medical and allied specialist categories" to be assigned doctor's functions and those only, and interpreted the law that a doctor inducted under the statute was in the same status, so far as his obedience to order is concerned, as if he had been inducted under other conscription statutes and could not insist on being used in the medical category. He therefore denied the writ.

On appeal, as the Court of Appeals pointed out, the case was argued and briefed by the Government on the broad theory that under the statute doctors could be drafted and used for any purpose the Army saw fit, that duty assignment for such

inductees was a matter of military discretion. The court agreed and on that ground affirmed.

We granted certiorari, and in this Court the parties changed positions as nimbly as if dancing a quadrille. The Government here admits that the petitioner is entitled to duties generally within a doctor's field and says that he now has been assigned to such. The petitioner denies that he yet has duties that fully satisfy this requirement. Notwithstanding his position before the trial court, he further says that anyway he must be commissioned and wants this Court to order him commissioned or discharged.

In its present posture, questions presented are, first, whether to accept the Government's concession that one inducted as a medical specialist must be used as such; second, whether petitioner, as a matter of law, is entitled to a commission; third, whether the federal courts, by habeas corpus, have power to discharge a lawfully mustered member of the Armed Forces because of alleged discriminatory or illegal treatment in assignment of duties.

This Court, of course, is not bound to accept the Government's concession that the courts below erred on a question of law. They accepted the Government's argument as then made and, if they were right in doing so, we should affirm. We think, however, that the Government is well advised in confessing error and that candid reversal of its position is commendable. We understand that the Army accepts and is governing itself by the Government's present interpretation of its duty toward those conscripted because of professional skills. To separate particular professional groups from the generality of the citizenship and render them liable to military service only because of their expert callings, and after induction, to divert them from the class of work for which they were conscripted would raise questions not only of bad faith but of unlawful discrimination. We agree that the statute should be interpreted to obligate the Army to classify specially inducted professional personnel for duty within the categories which rendered them liable to induction. It is not conceded, however, that particular duty orders within the general field are subject to judicial review by habeas corpus.

We cannot comply with the appellant's insistence that we order him to be commissioned or discharged. We assume that he is correct in stating that it has been a uniform practice to commission Army doctors; indeed, until 1950 Congress provided that the Army Medical Corps should consist of ". . . commissioned officers below the grade of brigadier general." 10 U.S.C. § 91. But in 1950 Congress repealed § 91 and substituted in its place the following language: "[The Medical Corps] . . . shall consist of Regular Army officers appointed and commissioned therein and such other members of the Army as may be assigned thereto by the Secretary of the Army. . . ." 10 U.S.C. § 81-1. 10 U.S.C. § 94 provides that medical officers of the Army may be assigned by the Secretary of the Army to such duties as the interests of the service demand. Thus, neither in the language of the Universal Military Training and Service Act nor of the Army Reorganization Act referred to above is there any implication that all personnel inducted under the Doctor's Draft Act and assigned to the Medical Corps be either commissioned or discharged.

Petitioner, by his concessions on the hearing to the effect that the question of commission was not involved, may have avoided a full litigation of the facts which lie back of his noncommissioned status, but enough appears to make plain that there was cause for refusing him a commission.

It appears that just before petitioner was inducted he applied for and was granted a commission as captain in the Medical Corps, United States Air Force Reserve. When he refused to execute the loyalty certificate prescribed for commissioned officers, his appointment was revoked and he was discharged. This petitioner refused information as to his membership in or association with organizations designated by the Attorney General as subversive or which advocated overthrow of the Government by force and violence. He gave as his reason that "as a matter of conscience, I object to filling out the loyalty certificate because it involves an inquisition into my personal beliefs and views. Moreover, the inquiry into organizational affiliations employs the principle of guilt by association, to which I am vigorously opposed.

Further, it is my understanding that all the organizations were listed by the Attorney General without notice or hearing which has caused the Supreme Court to invalidate it."

After he was inducted, petitioner applied for another commission and filed the required loyalty certificate but again refused to supply the requested information. He stated, "I have attended public meetings of the Civil Rights Congress and the National Council of American-Soviet Friendship. In 1943, I co-authored a radio play for the latter organization. Over a period of 7-1/2 months I attended classes at the Jefferson School of Social Sciences (ending in the Spring of 1950). With respect to any other organizations contained on the annexed list I am compelled to claim my Federal Constitutional Privilege. However, I never considered myself an organizational member of any of the aforesaid." As to the question "Are you now or have you ever been a member of the Communist Party, U.S.A. or any Communist Organization?" he said, "Federal constitutional privilege is claimed."

The petitioner appears to be under the misconception that a commission is not only a matter of right, but is to be had upon his own terms.

The President commissions all Army officers. 5 U.S.C. § 11. We have held that, except one holding his appointment by virtue of a commission from the President, he is not an officer of the Army. United States v. Mouat, 124 U.S. 303, 31 L. Ed. 463, 8 S. Ct. 505. Congress has authorized the President alone to appoint Army officers in grades up to and including that of colonel, above which the advice and consent of the Senate is required. 55 Stat. 728, as amended, 57 Stat. 380.

It is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief. Whatever control courts have exerted over tenure or compensation under an appointment, they have never assumed by any process to control the appointing power either in civilian or military positions.

Petitioner, like every conscript, was inducted as a private. To obtain a change of that status requires appointment by or under authority of the President. It is true that

the appointment he seeks is one that long and consistent practice seems never to have been denied to one serving as an Army doctor; one, too, that Congress in authorizing the draft of doctors probably contemplated normally would be forthcoming. But, if he is the first to be denied a commission, it may also be that he is the first doctor to haggle about questions concerning his loyalty. It does not appear that it is the President who breaks faith with Congress and the doctors of America. We are not easily convinced that the whole military establishment is out of step except Orloff.

The President's commission to Army officers recites that "reposing special trust and confidence in the patriotism, valor, fidelity and abilities" of the appointee, he is named to the specified rank during the pleasure of the President. Could this Court, whatever power it might have in the matter, rationally hold that the President must, or even ought to, issue the certificate to one who will not answer whether he is a member of the Communist Party?

It is argued that Orloff is being punished for having claimed a privilege which the Constitution guarantees. No one, at least no one on this Court which has repeatedly sustained assertion by Communists of the privilege against self-incrimination, questions or doubts Orloff's rights to withhold facts about himself on this ground. No one believes he can be punished for doing so. But the question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a post of honor and trust. We have no hesitation in answering that question "No."

It is not our view of Orloff's fitness that governs. Regardless of what we individually may think of the usefulness of loyalty oaths or the validity of the Attorney General's list of subversive organizations, we cannot doubt that the President of the United States, before certifying his confidence in an officer and appointing him to a commissioned rank, has the right to learn whatever facts the President thinks may affect his fitness. Perhaps we would not ask some of these questions, or we might ask others, but if there had never been an Attorney General's list the President would be within his

rights in asking any questions he saw fit about habits, associations and attitudes of the applicants for his trust and honor. Whether Orloff deserves appointment is not for judges to say and it would be idle, or worse, to remand this case to the lower courts on any question concerning his claim to a commission.

This leaves the question as to whether one lawfully inducted may have habeas corpus to obtain a judicial review of his assignments to duty. The Government has conceded that it was the legal duty of the Army to assign Orloff to duties falling within "medical and allied specialist categories." However, within the area covered by this concession there are many varieties of particular duties. The classification to which petitioner belonged for inductive purposes was defined by statute to be "medical and allied specialist categories." This class includes not merely doctors and psychiatrists but other medical technicians, and, while the duties must be within this category, a large area of discretion as to particular duties must be left to commanding officers. The petitioner obtained basic medical education at the expense of the Government. In private life he has pursued a specialty. But the very essence of compulsory service is the subordination of the desires and interests of the individual to the needs of the service. A conscripted doctor may have pursued the specialty of obstetrics, but in the Army, which might have limited use for his specialty, could he refuse other service within the general medical category?

Each doctor in the Army cannot be entitled to choose his own duties, and the Government concession does not extend to an admission that duties cannot be prescribed by the military authorities or that they are subject to review and determination by the judiciary.

The nature of this issue is pointed up by the controversy that survives the changes the parties have made in their positions in this Court. It is admitted that Orloff is now assigned to medical duties in the treatment of patients within the psychiatric field. He is not allowed functions that pertain to commissioned officers, but, apart from that, he is restricted from administering certain drugs and treatments said to induce or

facilitate a state of hypnotism. Orloff claims this as his professional prerogative, because in private practice he would be free to administer such treatments. The Government says, however, that because of doubts about his loyalty he is not allowed to administer such drugs since his patients may be officers in possession of important military information which he could draw out from them while they were under the influence of the drugs. Of course, if it were the function or duty of the judiciary to resolve such a controversy, this case should be returned to the District Court to take evidence as to all issues involved.

However, we are convinced that it is not within the power of this Court by habeas corpus to determine whether specific assignments to duty fall within the basic classification of petitioner. It is surely not necessary that one physician be permitted to cover the whole field within the medical classification, nor would we expect that a physician is exempt from occasional or incidental duties not strictly medical. In these there must be a wide latitude allowed to those in command.

We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.

But the proceeding being in habeas corpus, petitioner urges that, if we may not order him commissioned or his duties redefined, we may hold that in default of granting

his requests he may be discharged from the Army. Nothing appears to convince us that he is held in the Army unlawfully, and, that being the case, we cannot go into the discriminatory character of his orders. Discrimination is unavoidable in the Army. Some must be assigned to dangerous missions; others find soft spots. Courts are presumably under as great a duty to entertain the complaints of any of the thousands of soldiers as we are to entertain those of Orloff. The effect of entertaining a proceeding for judicial discharge from the Army is shown from this case. Orloff was ordered sent to the Far East Command, where the United States is now engaged in combat. By reason of these proceedings, he has remained in the United States and successfully avoided foreign service until his period of induction is almost past. Presumably, some doctor willing to tell whether he was a member of the Communist Party has been required to go to the Far East in his place. It is not difficult to see that the exercise of such jurisdiction as is here urged would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities.

We see nothing to be accomplished by returning this case for further litigation. The judgment is

Affirmed.

---

b. Reviewability Under Mindes.

(1) As discussed above, the doctrine of nonreviewability of military activities was short-lived after Orloff. A series of subsequent decisions established that military decisions could be the subject of judicial review.[57] In 1971, the United States Court of Appeals for the Fifth Circuit, in Mindes

[57]See Harmon v. Brucker, 355 U.S. 579 (1958).

v. Seaman,[58] synthesized existing case law involving judicial review of military activities and formulated an analysis for determining the reviewability of military activities. A majority of the courts of appeals have since adopted the "Mindes test" for reviewability.

MINDES v. SEAMAN

453 F.2d 197 (5th Cir. 1971)

CLARK, Circuit Judge:

According to the allegations of his complaint, which must be taken as admitted in the procedural posture of this appeal, Air Force Captain Milbert Mindes has tenaciously sought to void a factually erroneous and adverse Officer Effectiveness Report (OER) which resulted in his being separated from active duty and placed in a reserve status. However, his efforts to date have been fruitless. After traversing all available intraservice procedural reviews--ending with a denial of relief by the civilian Air Force Board for Correction of Military Records (Board)--Mindes filed a complaint seeking declaratory and injunctive relief in the district court. On a hearing on plaintiff's motion for a temporary restraining order and before answer or other responsive pleading, that court not only denied the temporary restraining order but also dismissed the cause with prejudice for want of jurisdiction. We vacate and remand with directions to review the cause on its merits, applying the standards articulated here.

Bell v. Hood, 327 U.S. 678, . . . (1946) teaches that the procedure of rendering a final dismissal for want of jurisdiction should be utilized sparingly. This analysis by Professor Wright is apt. "[F]ederal jurisdiction exists if the complaint states a case arising under federal law, even though on the merits the party may have no federal right. If his claim is bad, then judgment is to be given against him on the merits, and even if the court is persuaded that federal law does not give the right the party

[58]453 F.2d 197 (5th Cir. 1971).

claims, it is to dismiss for failure to state a claim on which the relief can be granted rather than for want of jurisdiction. Dismissal for want of jurisdiction is appropriate only if the federal claim is frivolous or a mere matter of form." (Footnotes omitted). C. Wright, Law of Federal Courts, 62 (2d Ed. 1970). Since we find that Mindes' federal claims are not frivolous, it follows that the court erred in basing its dismissal on lack of jurisdiction. The proper test was to determine if this cause fails to state a claim on which relief may be granted.

Not only because a judgment which is right for the wrong reasons is due to be affirmed, but also since the core issue must be faced on remand, an unreasoned vacation of the dismissal as procedurally erroneous could be improper or constitute poor judicial husbandry. Hence we make this somewhat detailed analysis of when internal military affairs should be subjected to court review.

What we really determine is a judicial policy akin to comity. It is a determination made up of several subjective and interrelated factors. Traditional judicial trepidation over interfering with the military establishment has been strongly manifested in an unwillingness to second-guess judgments requiring military expertise and in a reluctance to substitute court orders for discretionary military decisions. Concern has also been voiced that the courts would be inundated with servicemen's complaints should the doors of reviewability be opened. But the greatest reluctance to accord judicial review has stemmed from the proper concern that such review might stultify the military in the performance of its vital mission. On the other hand, the courts have not entirely refrained from granting review and sometimes subsequent relief. However, no collection or collation of these cases has yet been attempted by this circuit. This is the task we undertake now.

The basic starting point is obviously the precedents of the Supreme Court. In Harmon v. Brucker, 355 U.S. 579, . . . (1958) the Secretary of the Army had issued discharge certificates in a form other than "honorable," and in doing so had taken into account the inductee's pre-induction activities. The Court, after construing various

statutes and regulations, concluded that the Secretary had acted beyond the scope of his statutory and regulatory powers in utilizing pre-induction activities as a basis for his decision. But more importantly for our purposes, the Court held that the federal courts may review matters of internal military affairs to determine if an official has acted outside the scope of his powers.

In Orloff v. Willoughby, 345 U.S. 83, . . . (1953) the habeas petitioner launched a two-prong attack on the failure of the Army to grant him a commission and to assign him duties befitting his civilian status as a doctor. Orloff first argued that under the applicable statutes he was entitled to a commission, and that it was denied him because he had exercised his Fifth Amendment rights against self-incrimination. The Court held that the Army was justified in refusing to commission Orloff due to the exercise of these rights since the President certainly had the discretion to deny a position of honor and trust to one whose loyalty is in doubt. Nonetheless, note should be taken that the Court allowed review of this attack although it denied relief to Orloff on the merits. Secondly, Orloff contended that as a doctor he was entitled to duties commensurate with his particular civilian medical skills. The Army conceded that under the statutes Orloff was entitled to be assigned to duties in the medical field but argued that particular assignments within that field were within the discretion of the Army. The Court agreed, and went further, stating that the courts would not review duty assignments if discriminatorily made. However, this phase of Orloff's case raised no question of deprivation of constitutional rights or action clearly beyond the scope of Army authority. Thus the last statement of the Court must be read restrictively. The Court could not stay its hand if, for example, it was shown that only blacks were assigned to combat positions while whites were given safe jobs in the sanctuary of rear echelons.

In Reaves v. Ainsworth, 219 U.S. 296, . . . (1911), Reaves was found by a medical board to be mentally unfit for promotion, which finding required that he be discharged from the service. Reaves mounted a double-barreled assault on the Army,

claiming a denial of due process. First, he attacked the jurisdiction of the board; but the Court, after reviewing the merits, found that the board did not lack jurisdiction. Second, Reaves argued that even if the board had jurisdiction, its exercise of that jurisdiction was arbitrary and capricious. The Court declined to even review the merits of this latter argument, stating that to do so would involve the courts in commanding and regulating the Army. The reason we discern for this refusal to review is that it would have entailed an analysis of the medical records and a determination of Reaves' fitness as an officer. Clearly, the Court was unwilling to venture into this area of military expertise.

In numerous cases the courts of appeal have held that review is available where military officials have violated their own regulations, which is one thing Mindes argues has happened to him. See, e.g., Feliciano v. Laird, 426 F.2d 424 (2d Cir. 1970); Van Bourg v. Nitze, 388 F.2d 577 (D.C. Cir. 1967). See also Bluth v. Laird, 435 F.2d 1065 (4th Cir. 1970); Nixon v. Secretary of Navy, 422 F.2d 934 (2d Cir. 1970); Schatten v. United States, 419 F.2d 187 (6th Cir. 1969), Smith v. Resor, 406 F.2d 141 (2d Cir. 1969).

Judicial review has been held to extend to the constitutionality of military statutes, executive orders, and regulations--another claim Mindes advances. See Morse v. Boswell, 289 F. Supp. 812 (D. Md. 1968), aff'd 401 F.2d 544 (4th Cir. 1968), in which the constitutionality of the statute allowing the President to call up reserve forces was reviewed and found constitutional. Similarly, in Goldstein v. Clifford, 290 F. Supp. 275 (D.N.J. 1968), a three-judge court reviewed the constitutionality of the statute and executive order providing for the call-up of reserves. Recently this Circuit had the opportunity to review the constitutionality of a regulation promulgated by the commander of a military installation. United States v. Flower, 452 F.2d 80 (5th Cir. 1971). Although the case contains a factual distinction since the plaintiff was not a serviceman, the following words are apt to the question here:

> We do not infer that the commander has unfettered discretion under this regulation. We hold only that within certain limits, the military establishment has authority to restrict the distribution of printed materials. This right to restrict distribution must be kept within reasonable bounds and courts may determine whether there is a reasonable basis for the restriction. Dash v. Commanding General Fort Jackson, South Carolina, 307 F. Supp. 849 (D., S.C., 1969), aff'd, Yahr v. Resor, 431 F.2d 690 (4th Cir.), cert. denied, 401 U.S. 981 (1970). Whether the Post Commander acts arbitrarily or capriciously, without proper justification, is a question which the courts are always open to decide. (Emphasis added). At 86.

However, some such attacks on regulations have produced the opposite result. In two cases in which reservists were called to active duty for failure to satisfactorily perform their reserve obligations, i.e., their long hair did not present the required "neat and soldierly appearance," the reservists mustered several constitutional arguments to support their alleged right to wear long hair, but the 2nd and 7th Circuits declined review. Anderson v. Laird, 437 F.2d 912 (7th Cir. 1971); Raderman v. Kaine, 411 F.2d 1102 (2d Cir. 1969). Both courts held that what constitutes a "neat and soldierly appearance," was within the discretion of the military. This Circuit, in a per curiam opinion, affirmed the dismissal of a case on the same subject in which the serviceman had failed to exhaust available service remedies. However, in dicta, the court reached the merits of the regulation and held it valid. Doyle v. Koelbl, 434 F.2d 1014 (5th Cir. 1970). With regard to exhaustion, see also In re Kelly, 401 F.2d 211 (5th Cir. 1968); Tuggle v. Brown, 362 F.2d 801 (5th Cir. 1966); and Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement, 55 Va. L. Rev. 483 (1969).

Litigation challenging individual orders alleged to violate the rights of the serviceman involved have been unsuccessful. Without noting the presence of any constitutional contention, the 9th Circuit has held that it would not review the question of why an officer was relieved from the command of his ship. Arnheiter v. Chafee, 435 F.2d 691 (9th Cir. 1970). In Cortright v. Resor, 447 F.2d 245 (2d Cir. 1971), the plaintiff soldier was transferred from New York to El Paso, Texas, allegedly because of First Amendment activities. The 2nd Circuit held that court interference with military transfer orders required a stronger showing than Cortright presented.

Court-martial convictions alleged to involve errors of constitutional proportions have consistently been held to be subject to court review. In Burns v. Wilson, 346 U.S. 137, . . . (1953), the Supreme Court held court-martial convictions of servicemen were subject to habeas corpus review, but the scope of that review was left uncertain. Subsequently, this Circuit held that a collateral habeas attack could inquire into the deprivation of constitutional rights. See Gibbs v. Blackwell, 354 F.2d 469 (5th Cir. 1965). See also McCurdy v. Zuckert, 359 F.2d 491 (5th Cir. 1966); Kauffman v. Secretary of the Air Force, 415 F.2d 991 (1969). Other circuits have done more than set aside court-martial convictions. In Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965), the 1st Circuit required the Board for the Correction of Military Records to expunge from a serviceman's record a dishonorable discharge eventuating from a court-martial which was infected by constitutional violations. The 10th Circuit followed suit. Smith v. McNamara, 395 F.2d 896 (10th Cir. 1968); Angle v. Laird, 429 F.2d 892 (10th Cir. 1970).

Selective service induction procedures present another area with clear precedent for judicial review, despite a limiting statute. 50 U.S.C.A.App. § 460(b)(3). See Oestereich v. Selective Service System, 393 U.S. 233 (1968), where the Board acted outside the scope of its statutory authority; and Wolff v. Selective Service Local Board No. 16, 373 F.2d 817 (2d Cir. 1967), where the Board deprived the plaintiffs of their First Amendment rights.

From this broad ranging, but certainly not exhaustive, view of the case law, we have distilled the primary conclusion that a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures. The second conclusion, and the more difficult to articulate, is that not all such allegations are reviewable.

A district court faced with a sufficient allegation must examine the substance of that allegation in light of the policy reasons behind nonreview of military matters. In making that examination, such of the following factors as are present must be weighed (although not necessarily in the order listed).

1. The nature and strength of the plaintiff's challenge to the military determination. Constitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal in the whole scale of values--compare haircut regulation questions to those arising in court-martial situations which raise issues of personal liberty. An obviously tenuous claim of any sort must be weighted in favor of declining review. See, e.g., Cortright v. Resor, supra.

2. The potential injury to the plaintiff if review is refused.

3. The type and degree of anticipated interference with the military function. Interference per se is insufficient since there will always be some interference when review is granted, but if the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief.

4. The extent to which the exercise of military expertise or discretion is involved. Courts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military functions. We do not intimate how these factors should be balanced in the case sub judice. That is the trial court's function.

Mindes alleges that: (i) he was denied due process because his separation from the service was based upon a factually erroneous OER: (ii) the promotion or discharge regulation, AFR 36.12 & 74(c), violates due process; (iii) the Board denied him due process by failing to conduct a full, fair, and impartial hearing; and (iv) the Board denied him due process by failing to file findings of fact and conclusions of law. While we can assert that Mindes' allegations, in toto, are sufficient to withstand a motion to dismiss at the pleading stage, it is for the district court to weigh and balance the factors we have set out as to the proven or admitted facts. Therefore, nothing said here should be read as intimating any opinion as to reviewability or outcome of any part of his claims.

The judgment of the district court is vacated and the cause is remanded for further proceedings not inconsistent with the opinion.

Vacated and remanded.

---

(2) The Mindes test involves a two-step analysis for determining whether courts may review military determinations. First, a court should not intervene in internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an assertion that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice remedies. If a plaintiff is able to meet the threshold requirements of Mindes, review still is not a certainty. In determining whether review is appropriate, the court must balance the nature and strength of the plaintiff's claim, the potential injury to the plaintiff if review is denied, the degree of interference with the military function, and the extent to which military expertise and discretion are involved. Gonzalez v. Department of the Army provides an example of the application of the "Mindes test."

GONZALEZ v. DEPARTMENT OF THE ARMY

718 F.2d 926 (9th Cir. 1983)

Before PECK, FLETCHER, and PREGERSON, Circuit Judges.

FLETCHER, Circuit Judge:

Appellant, an Army Major, appeals from the district court's dismissal of his complaint alleging race discrimination in violation of Title VII, 42 U.S.C. § 2000e et seq. (1976 & Supp. V 1981), 42 U.S.C. § 1981 (1976), and 42 U.S.C. § 1983 (Supp. V 1981). The district court dismissed the complaint because it found appellant's claims nonjusticiable and unreviewable, holding that Title VII did not apply to uniformed members of the Armed Forces, and that the section 1981 claim was barred by the doctrine of sovereign immunity. Appellant filed a timely appeal; this court's jurisdiction rests on 28 U.S.C. § 1291 (1976). We affirm the district court's judgment.

I

FACTS

Appellant, Aristides Gonzalez, is a native of Puerto Rico and a regular commissioned officer in the Army, holding the rank of Major. He entered on active duty in 1965 as a Second Lieutenant. He was promoted to First Lieutenant in 1966 and to Captain in 1967. From 1967 to 1980 appellant was several times considered for, but not promoted to, the rank of Major. During this period appellant alleges that he had outstanding ratings and would have been promoted but for the intentional race discrimination practiced by the Army.

In 1980, appellant was terminated from duty in the Army. At that time he began to pursue administrative remedies seeking a correction of his record and reinstatement. Through this process, several of his performance ratings were raised and

he was granted reinstatement and a promotion to Major with a retroactive effective date of October 1, 1979.

Appellant contends that despite this retroactive promotion he is "at least four years behind his class-year contemporaries in the promotion process." He claims that this and other injuries were caused by the Army's intentional race discrimination. The discrimination that the Army practiced is alleged to consist of: (1) reliance on Officer Efficiency Ratings (OERs) that purport to measure the qualifications of eligible officers, but actually operate to discriminate against persons of appellant's race and national origin; (2) inadequate recruitment of minorities and failure to accept them on an equal and impartial basis; (3) reliance on arbitrary, non-job-related requirements for continued employment; and (4) other generalized complaints regarding Army recruitment and promotion programs.

Appellant filed this action against the Army in September, 1980. It was stayed pending the outcome of the Army administrative hearings which resulted in appellant's reinstatement. Following the conclusion of the administrative proceedings, the Army moved to dismiss appellant's complaint. The district court granted the motion to dismiss without giving appellant leave to amend.

II

DISCUSSION

A. Appellant's Title VII Claim.

[The court held that Title VII did not apply to uniformed members of the military.]

B. Appellant's Section 1981 Claim.

The district court dismissed appellant's claim of intentional race discrimination in violation of 42 U.S.C. § 1981 (1976), on the ground that the Army and the Secretary of the Army, as agents of the United States, were immune from suit. Without addressing the correctness of this ruling, we affirm the district court's dismissal of appellant's section 1981 claim but on a different basis.

In Chappell v. Wallace, 462 U.S. 296 (1983), the Supreme Court remanded to this court a suit by a number of Navy enlisted men alleging race discrimination by their superior officers in order for us to determine whether the plaintiffs' claims for relief might be cognizable under 42 U.S.C. § 1985(3). See id. at 2368 n. 3. Implicit in the court's order of remand is the recognition that, in some situations at least, uniformed members of the Armed Services may assert that their constitutional and statutory rights have been violated by their superiors. See id. at 2368. We need not decide in this case, however, whether appellant Gonzalez's claims against the Army of race discrimination in violation of section 1981 are cognizable because, even if we assume that he may assert his claims of discrimination under section 1981, the particular claims that appellant makes are nonreviewable. See Wallace v. Chappell, 661 F.2d 729, 732-33 (9th Cir. 1981), rev'd on other grounds, 462 U.S. 296 (1983).

In Wallace v. Chappell, we adopted, with some modification, the approach outlined by the Fifth Circuit in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), to the question of whether a civilian court should review a serviceman's allegation of a deprivation of constitutional rights by the military. See 661 F.2d at 732-34. The Mindes-Wallace analysis requires two separate multi-factored inquiries. First,

> an internal military decision is unreviewable unless the plaintiff alleges (a) a violation of the Constitution, a federal statute, or military regulations; and (b) exhaustion of available intraservice remedies.

Wallace, 661 F.2d at 732; Mindes, 453 F.2d at 201. The Army essentially concedes that appellant has met these initial requirements. It argues, however, that review of appellant's challenge to the Army's promotion decisions in this case is precluded under the second part of the Mindes-Wallace analysis. This second phase consists of a weighing of four factors to determine whether review should be granted:

> (1) The nature and strength of the plaintiff's claim. . . . [C]onstitutional claims ordinarily carry greater weight than those resting on a statutory or regulatory base, but . . . within the class of constitutional claims, the nature and strength of the claim can vary widely.
>
> (2) The potential injury to the plaintiff if review is refused.
>
> (3) The extent of interference with military functions. . . . [I]nterference per se should not preclude review because some degree of interference will always exist.
>
> (4) The extent to which military discretion or expertise is involved.

Wallace, 661 F.2d at 733; see also Mindes, 453 F.2d at 201-02.

After evaluating each of these factors, we conclude that the district court's decision not to hear appellant's claim under section 1981 should be affirmed. Even though appellant alleges "recognized" constitutional claims of the type that may be reviewed, see Wallace, 661 F.2d at 734, the other Mindes-Wallace factors strongly militate against reviewability. The second factor weighs against review, because the potential injury to appellant if review is denied is not substantial. He has already been reinstated by the Army with retroactive promotion to the rank of Major. He now seeks

an earlier retroactive promotion date and guaranteed promotions in the future. Even if upon review these claims would have been upheld, the most that appellant would have gained is an earlier retroactive promotion date. As a result of the administrative action, he is eligible for promotions in the future and if these are discriminatorily denied, the decisions may be challenged through the appropriate administrative procedure. The third and fourth factors also counsel against review of appellant's claims. The interference with the Army if appellant's claims were reviewed would be significant. The officers who participated in reviewing appellant's performance would have to be examined to determine the grounds and motives for their ratings. Other evidence of appellant's performance would have to be gathered for the 10-year period in question. In short, the court would be required to scrutinize numerous personnel decisions by many individuals as they relate to appellant's claim that he was improperly denied promotion. This inquiry would involve the court in a very sensitive area of military expertise and discretion. While we would not shrink from such an assessment in a civilian setting, the same hesitation that precludes a Bivens-type claim in the military setting, see Chappell v. Wallace, 103 S. Ct. at 2364-67, compels restraint here. For these reasons, we hold that under the analysis described in Wallace v. Chappell and Mindes v. Seaman, review of appellant's section 1981 claim of discrimination in promotion must be denied.

Our assessment is consistent with the Supreme Court's decision in Reaves v. Ainsworth, 219 U.S. 296, 31 S. Ct. 230, 55 L.Ed.225 (1911). There, a military officer sought review of a decision by the Army to discharge him without retirement pay. He claimed that the military board of examiners that made the decision in his case acted arbitrarily and deprived him of due process. The Court rejected his efforts to secure review of the discharge, stating that such a determination falls within the scope of the military tribunal's lawful powers and "cannot be viewed or set aside by the courts." Id. at 304, 31 S. Ct. at 233. As the Fifth Circuit observed in Mindes with regard to the decision in Reaves

> The reason we discern for this refusal to review is that it would have entailed an analysis of the medical records and a determination of Reaves' fitness as an officer. Clearly, the Court was unwilling to venture into this area of military expertise.

453 F.2d at 200 (emphasis added). In like manner, we decline the invitation to engage in a review of appellant's fitness for promotion to higher levels of military authority or the timing of such promotions.

CONCLUSION

Because a Title VII suit is unavailable to appellant and because his claims under 42 U.S.C. § 1981 are unreviewable, the judgment of the district court is

AFFIRMED.

---

(3) The Supreme Court has never explicitly adopted the "Mindes test"; however, it now represents the weight of authority in the lower courts. To date, the United States Courts of Appeals for the First, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits have expressly followed Mindes.[59] The United States Court of Appeals for the Sixth Circuit has cited Mindes favorably,

[59]Diekan v. Stone, 995 F.2d 1061 (1st Cir. 1993); Penagaricano v. Llenza, 747 F.2d 55 (1st Cir. 1984); Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991); Mickens v. United States, 760 F.2d 539 (4th Cir. 1985), cert. denied, 474 U.S. 1104 (1986); Gochnour v. Marsh, 754 F.2d 1137 (5th Cir.), cert. denied, 471 U.S. 1057 (1985); West v. Brown, 558 F.2d 757 (5th Cir. 1977), cert. denied, 435 U.S. 926 (1978); Nieszner v. Mark, 684 F.2d 562 (8th Cir. 1982), cert. denied, 460 U.S. 1022 (1983); Gilliam v. Miller, 973 F.2d 760 (9th Cir. 1992); Khalsa v. Weinberger, 787 F.2d 1288 (9th Cir. 1986); Wallace v. Chappell, 661 F.2d 729 (9th Cir. 1981), rev'd on other grounds, 462 U.S. 296

footnote continued next page

although it did not formally apply the "Mindes test,"[60] while the Federal Circuit has placed limited reliance on Mindes. The Second, Third, Seventh, and District of Columbia Circuits have either explicitly or implicitly rejected the Mindes approach.[61]

In rejecting the Mindes test the other circuit courts do not necessarily imply that review of military decisions is readily available. The Seventh Circuit agreed with the Third Circuit that "the Mindes approach erroneously 'intertwines the concept of justiciability with the standards to be applied to the merits of the case."[62] Instead, the Seventh Circuit adopted the test of "whether the military seeks to achieve legitimate ends by means designed to accommodate the individual right at stake to an appropriate degree."[63]

> Knutson's challenge to his termination, on the other hand, implicates only the nature of the procedure used in his termination. The interference that judicial review poses here is more than a matter of administrative inconvenience. These sorts of reinstatement claims, often pending for several years in civilian courts, may well leave [the ANG] in limbo

---

(..continued)
(1983); Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981); Clark v. Windall, 51 F.3d 917 (10th Cir. 1995); Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987), cert. denied, 488 U.S. 959 (1988); Rucker v. Sec'y of Army, 702 F.2d 966 (11th Cir. 1983).

[60]Schultz v. Wellman, 717 F.2d 301 (6th Cir. 1983).

[61]Maier v. Orr, 754 F.2d 973, 983 n.9 (Fed. Cir. 1985). Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d 765 (7th Cir.), cert. denied, 114 S.Ct. 347 (1993); Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976); Mack v. Rumsfeld, 609 F. Supp. 1561, 1563 (W.D.N.Y. 1985), aff'd, 784 F.2d 438 (2d Cir.), cert. denied, 479 U.S. 815 (1986); Dillard v. Brown, 652 F.2d 316 (3d Cir. 1981); Kreis v. Sec'y of Air Force, 866 F.2d 1508 (D.C. Cir. 1989).

[62]Knutson v. Air National Guard, 995 F.2d at 768; Dillard, 652 F.2d at 323; accord Kreis, 866 F.2d at 1512.

[63]Knutson, 995 F.2d at 768.

> awaiting the outcome of litigation and thus significantly hamper its ability to staff properly and to fulfill its mission. If civilian courts are regularly open to claims challenging personnel decisions of the military services, judicial review may also undermine military discipline and decision-making or impair training programs and operational readiness. For these reasons, civilian courts have traditionally deferred to the superior experience of the military in matters of duty orders, promotions, demotions, and retentions. Knutson's request for reinstatement would require us to intrude on a province committed to the military's discretion, which we decline to do.[64]

The Seventh Circuit's standard, at least in this case, appears to be less intrusive of military affairs than a Mindes analysis. The District of Columbia Circuit is in accord with the Seventh Circuit in matters such as promotion. "To grant such relief would require us to second-guess the Secretary's decision about how best to allocate military personnel. . . . This court is not competent to compare appellant with other officers competing for such a promotion."[65] Alternatively, the court was willing to review a matter involving "only whether the Secretary's decision making process was deficient, not whether his decision was correct."[66] "To grant the relief . . . would not require the district court to substitute its judgment for that of the Secretary . . . [but] only require the Secretary on remand to explain more fully the reasoning behind his decision . . . ."[67]

The Third Circuit, by contrast, finds a strong presumption of reviewability in cases seeking injunctive relief from the military. "[S]uits against the military are non-cognizable in federal court only in

---

[64]Knutson at 771.

[65]Kreis, 866 F.2d at 1511.

[66]Id.

[67]Id. at 1512.

the rare case where finding for plaintiff require[s] a court to run the military.'[68] If the military justification outweighs the infringement of the plaintiff's individual freedom, we may hold for the military on the merits, but we will not find the claim to be non-justiciable and therefore not cognizable by a court.[69]

The Sixth and Federal Circuits have placed limited reliance on Mindes. "We decline . . . to review or second guess the manifestly reasonable interpretation of military law represented by the decision of the administrative discharge board in this case."[70]

[68]Jorden v. National Guard Bureau, 799 F.2d 99, 111 (3d Cir. 1986) (quoting Dillard v. Brown, 652 F.2d 316, 322 (3d Cir. 1981)). An example of such a case is Gilligan v. Morgan, 93 S. Ct. 2440 (1973).

[69]Dillard v. Brown, 652 F.2d 316, 323-324 (3d Cir. 1981).

[70]Schultz v. Wellman, 717 F.2d 301, 307 (6th Cir. 1983) (citing Mindes). See also Maier v. Orr, 754 F.2d 973, 983 n.9 (Fed. Cir. 1985).